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No. 83-751

In the Supreme Court of the United States

OCTOBER TERM, 1983

SECURITIES AND EXCHANGE COMMISSION, ET AL.,
Petitioners,

vs.

JERRY T. O'BRIEN, INC., ET AL.,
Respondents.

On Appeal from The United States Court of Appeals For the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC., AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The North American Securities Administration Association, Inc. (NASSA), a national organization whose membership includes the securities law administrators of the Fifty States, the District of Columbia, Puerto Rico, and Guam, hereby respectfully moves for leave to file the attached brief, as *amicus curiae*, in this case. The consent of the Solicitor General for the Petitioners has been obtained. The consent of the attorneys for the Respondents was requested but was neither granted nor opposed.

The interest of NASAA in this case arises from the fact that all its members are charged with the enforcement of the securities laws of the various states. Thirty-nine of these jurisdictions have the Uniform Securities Act which is similar to the Securities Act of 1933 and the Securities Exchange Act of 1934. Section 407 of the Uniform Securities Act is based upon Sections 21(a)-(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(a)-(d). Section 407(a) authorizes the Administrator to make public and private investigations and Section 407(b) authorizes him to issue subpoenas in support of those investigations. The remaining fourteen members have enforcement provisions in their statutes similar to those of the Securities Exchange Act and the Uniform Securities Act. NASAA has conducted an annual survey of enforcement actions brought under these provisions. This survey shows that during the fiscal year 1982, the twenty-nine states which reported, conducted 2,867 investigations. During the fiscal year 1983, with thirty states reporting, the survey shows that 3,061 investigations were conducted. Finally, for the fiscal year 1984 to date, with thirty-one jurisdictions re-

porting, the survey shows that 3,363 investigations have been conducted.

These numbers plus the close similarity between the statutes and procedures which are the subject of the present case and those of the NASAA members indicate that the decision of the Court in this case will have a very great impact upon the ability of the member states to continue to enforce effectively their securities acts. To NASAA's knowledge, the issue has already been raised in at least two state securities enforcement cases. *See, State* v. *Ludwig*, Cause No. 83-1-01483-4 (Wash.Super., Pierce County, 1984); *State* v. *Montgomery*, Cause No. 83-1-01700-5 (Wash.Super., King County, 1984). In both these cases the trial judges in oral opinions from the bench refused to follow the lower court's decision in the present case in favor of the reasoning of the court in *Pepsico* v. *SEC*, 563 F.Supp. 828 (S.D. N.Y. 1983). Both state cases are still pending so no appeal has yet been taken.

Because the case will heavily impact upon the enforcement program of its members, NASAA would like the opportunity through the attached brief to present the Court with its views as an *amicus curiae*.

Respectfully submitted,

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Dated: Norman, Oklahoma
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BRIEF FOR THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC., AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The North American Securities Administrators Association, Inc. (NASAA) is a non-profit voluntary membership corporation. Membership in NASAA is open to all state and provincial securities regulators and agencies in the United States, Canada, and Mexico. Presently its membership includes the state officials charged with enforcing the state securities laws of all the states, the District of Columbia, Puerto Rico, and Guam as well as all the Canadian provinces. The purpose of the organization is to deal with issues of common interest, to further the enforcement of the state blue sky laws, and to coordinate such state statutes with the federal securities laws by cooperating with the Securities and Exchange Commission (SEC) in the areas of mutual interest.

The present case deals with the investigatory and subpoena power of the Securities and Exchange Commission. As noted in its Motion for Leave to File Brief *Amicus Curiae*, thirty-nine of the NASAA members are charged with the enforcement of the Uniform Securities Act. This statute is based heavily upon the Securities Act of 1933, 15 U.S.C. § 77a, *et seq.* and the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq.* Sections 407(a) and (b) of this statute are drawn from Section 21(a)-(d) of the Exchange Act which are the subject matter of the present case and allow the state securities administrators to conduct investigations similar to those conducted by the SEC and to issue subpoenas in support of those investigations. Also as noted in its Motion, NASAA's records show that its member agencies have conducted more than 9,000 investigations during the last three fiscal years. As a result NASAA and the state member agencies play a very large role in the enforcement of the securities laws of the country.

Because of the nature of their enforcement role and the close similarity of the statutes in the present case and those which NASAA members are charged with enforcing, the present case will have heavy impact upon the NASAA membership. In fact, the Ninth Circuit's opinion has already been the basis for motions by two defendants in state securities enforcement actions. *See State* v. *Ludwig*, Cause No. 83-1-01483-4 (Wash.Super. Pierce County, 1984) and *State* v. *Montgomery*, Cause No. 83-1-01700-5 (Wash.Super., King County, 1984). In both of these cases, the trial judge in oral opinions from the bench refused to follow the Ninth Circuit's decision in the present case in favor of the decision in *Pepsico* v. *SEC*, 563 F.Supp. 828 (S.D.N.Y. 1983).

SUMMARY OF ARGUMENT

The court below held that "targets" of subpoenas issued to third parties by the Securities and Exchange Commission (SEC) have a right to receive notice of these subpoenas so that a "target" would have an opportunity to assure that an investigation was being conducted consistently with the standards set out by this Court in *United States* v. *Powell*, 379 U.S. 48 (1964). The lower court erred because the *Powell* standards do not apply to agency investigations *per se*, but only to *judicial enforcement* of agency subpoenas. As the SEC had not requested enforcement of the subpoenas in the case below, application of the *Powell* standards was premature.

Because the Court of Appeals for the Ninth Circuit denied the petition for rehearing *en banc* (719 F.2d 300 (9th Cir. 1983)), the judgment of the lower court not only is available as precedent, but has already been used as such (*Wedbush, Noble, Cooke, Inc.* v. *SEC*, No. CV-83-3961 CBM (KX) (C.D.Cal. July 11, 1983, 714 F.2d 923 (9th Cir. 1983)). *Wedbush* imposed similar requirements on the SEC as the court below; however, the *Wedbush* court cast its decision in constitutional terms, *i.e.*, notice to "targets" of third party subpoenas is required by the Due Process Clause of the Fifth Amendment, U.S. Constitution. As the holding of the lower court has already been expanded beyond its original rationale, that is, from being judicially required to constitutionally required, the issues have become more myriad.

This Court in the landmark case of *Hannah* v. *Larche*, 363 U.S. 420 (1960), a case also involving a challenge to the investigatory procedures of an agency, approached the

legal sufficiency of the administrative procedures from three aspects: Was the procedure authorized by the Congress? Was the procedure constitutionally firm? And, was the procedure consistent with the decisions of the Court? NASAA forcefully asserts that all three inquiries should be answered in this case, as they were in *Hannah*, in the affirmative.

A review of the federal Administrative Procedure Act (APA), codified as 5 U.S.C. §§ 551 *et seq.*, its legislative history, subsequent admendments to the APA, and current regulatory reform efforts in the Congress, as well as of specific statutes authorizing not only the SEC but other agencies to issue third party subpoenas, is informative. These sources clearly demonstrate that federal statutory law authorizes the SEC to subpoena the information in the case below *without* notifying the "targets" of the issuance of the subpoenas to third parties. Likewise, decisions of this Court relating to constitutional challenges to administrative subpoenas (not only those raising Fifth Amendment issues but also involving Fourth Amendment issues) do not support the requirement imposed by the court below. Finally, a careful evaluation of *United States* v. *Powell*, together with further analysis of the structure and legislative history of the APA, indicate that the *Powell* standards are not "triggered" until an agency invokes the judicial process by seeking enforcement of a subpoena in a federal court. The scope of administrative investigation and subpoenas prior to judicial involvement is matter for determination by the Congress, subject to Constitutional limitations.

Because the "target"-notice requirement imposed on the SEC by the court below has no foundation either in the Constitution or in federal statutes and is not required

by the decisions of this Court, the judgment of the court below should be reversed.

POINT I

Federal agencies, and in particular the SEC, are not generally required by federal statutory law to notify "targets" of non-public investigations when subpoenas are issued to third parties.

Administrative process, whether federal or state, is structured around the applicable Administrative Procedure Act (APA) which imposes general procedures to be followed by agencies. The federal APA was passed unanimously by both House of Congress in 1946 (60 Stat. 237 (1946)) and is currently codified as 5 U.S.C. §§ 551 *et seq.* The APA's original investigation (§ 6(b)) and subpoena (§ 6(c)) sections have remained essentially the same as originally enacted and are codified as 5 U.S.C. § 555(c), (d). Section 6(b) currently provides: "Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law." (5 U.S.C. § 555(c)). Section 6(c) authorizes under particular circumstances agency subpoenas to be issued to a party, as well as judicial enforcement of subpoenas. (5 U.S.C. § 555(d)). This general outline of agency investigatory subpoena power has been expanded further by the Congress in specific statutes directed at individual agencies. With regard to the SEC, see, *e.g.*, Securities Act of 1933 (15 U.S.C. § 77s(b)); Securities Exchange Act of 1934 (15 U.S.C. § 78u(a)-(c)); Public Utility Holding Company Act (15 U.S.C. § 79r(c)); Trust Indenture Act of 1939 (15 U.S.C. § 77uuu(a)); Investment Company Act of 1940 (15 U.S.C. § 80a-40(b)); and Investment Advisers Act of 1940 (15

U.S.C. § 80b-9(b)). These specific statutes do not require the SEC to notify "targets" of third-party subpoenas.

In a few instances, however, the Congress has required an agency to provide notice to "targets" of third-party subpoenas. For example, the SEC (as well as other agencies) are required to notify "targets" under the Right to Financial Privacy Act of 1978 (12 U.S.C. § 3401(1), (5)) (particular customers of specified financial institutions). See 15 U.S.C. § 78u(h); see also 26 U.S.C. (& Supp. V) § 7609 (procedures for notice of IRS third-party subpoenas). The comparison is significant. Because the Congress has, in fact, included a requirement for notice to "targets" of third-party subpoenas in particular statutes, one must assume that Congress is aware of the significance of the requirement and the policies involved: protecting the interests of the "target" versus maintaining the "integrity of the investigation." (*Jerry T. O'Brien. Inc.*, v. *SEC, et al.*, 704 F.2d 1065, 1069 (9th Cir. 1983)). Because the particular statute (15 U.S.C. § 78u(c)) called into question by the lower court's decision does not require notice to "targets" of third-party subpoenas and because no indication exists that the SEC has otherwise bound itself by regulation to provide such notice, a conclusion begins to emerge: The Congress has not imposed a "target"-notice requirement applicable in this instance.

Although 15 U.S.C. § 78u(c) does not itself require notice, the APA itself must be examined to determine whether the Congress has imposed a general requirement in Section 6, APA (5 U.S.C. § 555) that notice be given to "targets". Not only does the language of Section 6 (§ 555) fail to reveal any verbage even closely related to the matter, subsequent events reinforce the conclusion that no Congressional

intent appears to exist that a general "target"-notice requirement is contained in the APA.

In the past twenty-two years, the Administrative Conference of the United States (ACUS) has forwarded to the Congress two recommendations on discovery: Recommendation 30 (S. Doc. No. 24, 88th Cong., 1st Sess. (1963)) and Recommendation 70-4 (1 CFR § 305.70-4) and one Recommendation on agency subpoenas: Recommendation 74-1 (1 CFR § 305.74-1). None of these Recommendations for amendment of the APA suggests that an agency is to notify a "target" of third-party subpoenas during the investigtory stage of an agency inquiry. To the contrary, Recommendation 70-4 (Discovery in Agency Adjudication) in paragraph 8 states:

> (b) *Names of Witnesses.* The presiding officer should have the authority upon motion by a party or other person, and for good cause shown, by order: (a) To restrict or defer disclosure by a party of the name of a witness, a narrative summary of the expected testimony of a witness or, in the case of an agency witness, any prior statement of the witness, and (b) to prescribe other appropriate measures to protect a witness. [By definition, "party" would include the agency itself. See Commentary, 1 Recommendations and Reports of the Administrative Conference of the United States 584 (1970).]

If the identities of third parties to whom subpoenas had been issued were already required to be released to "targets" during an agency investigation, the necessity for a protective order such as that recommended by ACUS would be moot, at least with regard to protecting a witness. The Recommendation, therefore, suggests that at least in 1970

no general requirement existed in the APA that "targets" be notified of investigatory third-party subpoenas.

Since the passage of the APA in 1946, three major pieces of legislation have been enacted by the Congress affecting public information: The Freedom of Information Act [FOIA] (5 U.S.C. § 552(a)(3)-(e)); the Privacy Act (5 U.S.C. § 552a); and the Federal Open Meetings Law (5 U.S.C. § 552b). If these statutes are examined, one discovers that each has provisions designed to protect the integrity of agency investigations. For example, the FOIA permits an agency to decline a request for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency" (5 U.S.C. § 552(b)(5)) and for "investigatory records compiled for law enforcement purposes. . . ." (5 U.S.C. § 552 (b)(7)). The Court only recently strengthened the "work-product" exemption (5 U.S.C. § 552(b)(5)) in *FTC* v. *Grolier Incorporated*, ... U.S. ....., 103 S.Ct. 2209 (1983).

Under the Privacy Act, an agency generally must grant access to an individual to a record contained in a system of records which includes information about the individual (5 U.S.C. § 552a(d)(1)); however, "nothing in this section [*i.e.*, the Privacy Act] *shall* allow an individual access to any information compiled in *reasonable anticipation* of a civil action or proceeding." (Emphasis added) (5 U.S.C. § 552a (d)(5)). This Privacy Act exemption interrelates with another exemption of the FOIA, *i.e.*, 5 U.S.C. § 552(b)(3) ("specifically exempted from disclosure by statute. . . .").

The Federal Open Meetings Law (also known as the "Government in Sunshine Act") permits an agency subject to the Law (which the SEC is (see 1976 U.S. Code Cong.

and Ad. News 2223)) to conduct its meetings in executive session if the meeting "specifically [concerns] the agency's issuance of a subpoena, or the agency's participation in a civil action or proceeding. . . ." (5 U.S.C. § 552b(c)(10)). See also 5 U.S.C. § 552b(c)(9) which permits executive sessions for an agency which regulates, *inter alia*, securities if a matter at the meeting might lead to significant financial speculation or endanger the stability of a financial institution. This exemption permits *any* agency subject to the Law to go into executive session if information at the meeting would frustrate significantly the implementation of a proposed agency action. The "Government in Sunshine" Act contains a third, relevant exemption (*i.e.*, one that would permit an executive session) which is similar to the law enforcement exemption contained in the FOIA. See 5 U.S.C. § 552b(c)(7) ("disclose investigatory records compiled for law enforcement purposes . . . but only to the extent that the production of such records . . . would . . . (D) disclose the identity of a confidential source. . . .").

Although these three statutes — the FOIA, the Privacy Act, and the "Government in the Sunshine" Act (all arguably part of the APA) — relate to agency release of information to the public (with consideration for privacy), each one includes exemptions from its application to preserve the integrity of investigatory function of agencies. These exemptions are inconsistent with a theory that under the APA an agency must provide notice to a "target" of the identities of third parties who have been subpoenaed.

Further indication of a lack of Congressional intent to subject federal agencies to a general APA requirement of notifying "targets" of third-party subpoenas involves an

action by the American Bar Association House of Delegates at its 1981 mid-year meeting held in Houston, Texas. The House of Delegates adopted a Recommendation to "support enactment of legislative proposals to amend the Administrative Procedure Act (APA) with respect to compulsory process: . . . D. To provide that persons other than the recipient of process who are the principal targets of an investigation are provided notice when a process seeks documents directly relating to their affairs. . . ." (Summary of Actions of the House of Delegates 10, 11 (ABA 1981).) This Recommendation was brought to the attention of the Congress on April 2, 1981, in testimony presented to the Subcommittee on Administrative Law and Governmental Relations of the Committee of the Judiciary, House of Representatives, during the First Session of the 97th Congress. The Subcommittee was holding hearings on H.R. 746 ("Regulatory Procedures Act of 1981"). Included in the record of these Hearings (Serial No. 27) is the ABA Report which accompanied the Recommendation, a portion of which explained (Hearings at 130):

> This provision is addressed to the not infrequent situation in which an agency seeks documents, such as bank records, held by a third party concerning the target of its investigation. An investigative target is powerless to invoke his rights unless he knows of the demand, and the person on whom the process is served may not have a sufficient incentive to challenge the process or to notify the individual in question. This recommendation would give the investigative target the ability to protect himself.
>
> This recommendation applies only to compulsory processes issued by an agency and not to any form of judicial process. The agency may, therefore, still use

> an appropriate form of judicial process if it believes it is essential to secure records on an individual without providing notice to that individual. . . .

The significance of the Recommendation is twofold: First, that the ABA believed it necessary to amend the APA to impose such a requirement and second, that despite having the concept brought to its attention, the Subcommittee did not include the Recommendation in H.R. 746 (introduced in *both* sessions of the 97th Congress). H.R. 746 did contain, however, other amendments to the investigation-and-subpoena section of the APA (5 U.S.C. § 555). In addition, S. 1080 ("The Regulatory Reform Act") which passed the Senate by 94-0 on March 24, 1982, but was not voted on by the House, has been reintroduced in the 98th Congress. S. 1080 did not (97th Congress) and does not (98th Congress) recommend any amendments to the APA relating to notice to "targets" of third party subpoenas.

The implication of this Congressional activity seems clear. At least the House of Representatives, and most likely the Senate, are aware of the ABA's Recommendation that the APA be amended to provide that notice be given to "targets" of third-party subpoenas. For whatever reason, the requirement was not included in either H.R. 746 or S. 1080.

Although not directly relevant, an additional observation should be made. One of the most recent and comprehensive evaluations of administrative process and what procedures should govern administrative agencies is the Model State Administrative Procedures Act (1981) which was approved and recommended for enactment in all the states by the National Conference of Commissioners on Uniform

State Laws. This Act does not include in its subpoena provisions any requirement that notice be given to "targets" of third-party subpoenas.

If one examines the APA as originally enacted, the subsequent amendments of the APA relating to release of information (with carefully drawn exemptions from release designed to protect the integrity of the investigatory function of agencies), and the recent Congressional activity concerning regulatory reform, one cannot help but conclude that the Congress did not originally and has not subsequently included in the APA a general principle that agencies must notify "targets" of third-party subpoenas. The conclusion to be drawn therefore, is that except for those few instances (*e.g.*, 26 U.S.C. (& Supp. V) § 7609) where express language imposes a "target"-notice requirement, such a requirement does not exist in federal statutory law. As a consequence, because no general requirement that notice be given is included in the APA and because the statute called into question by the court below (15 U.S.C. § 78u(c)) is not one of the statutes in which the Congress has expressly placed the notice requirement, the SEC was not (and is not) required by federal statutory law to notify "targets" of non-public investigations when subpoenas are issued to third parties.

POINT II

Federal agencies, and in particular the SEC, are not required by the Due Process Clause of the Fifth Amendment, U.S. Constitution, to notify "targets" of nonpublic investigations when subpoenas are issued to third parties.

Although the format of the federal Administrative Procedure Act (APA) is structured around the dichotomy of rule making versus adjudication (Attorney General's Manual on the Administrative Procedure Act 14 (1947)), agencies clearly perform functions not within either classification. For example, Representative Walter, one of the moving forces with regard to the APA's adoption, singled out the investigatory function as being separate and distinct from that of rule making and adjudication (92 Cong. Rec. 5648 (1946)). This Court, in the landmark case of *Hannah* v. *Larche*, 363 U.S. 420 (1960), confirmed the separate status of investigations in the administrative process. The distinction is not without significance (*Hannah* at 442):

> [A]s a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account. An analysis of these factors demonstrates why it is that the particular rights claimed by the respondents [e.g., identity of complaintants] need not be conferred upon those appearing before purely investigative agencies.

After these initial comments, the *Hannah* Court explored in general the investigatory function of agencies (*Hannah* at 445-46):

> The history of investigations conducted by the executive branch of the Government is also marked by a decided absence of those procedures here in issue. The best example is provided by the administrative regulatory agencies. Although these agencies normally make determinations of a quasi-judicial nature, they also frequently conduct purely fact-finding investigations. When doing the former, they are governed by the Administrative Procedure Act, and the parties to the adjudication are accorded the traditional safeguards of a trial. However, when these agencies are conducting nonadjudicative, fact-finding investigations, rights such as apprisal, confrontation, and cross-examination generally do not obtain . . . (Footnotes and citations omitted.)

The Court then acknowledged that the SEC, although not an executive agency, is an investigatory body of this type (*Hannah* at 446-48):

> Another regulatory agency which distinguishes between adjudicative and investigative proceedings is the Securities and Exchange Commission. This Commission conducts numerous investigations. . . . Although the Commission's Rules provide that parties to adjudicative proceedings shall be given detailed notice of the matters to be determined and a right to cross-examine witnesses appearing at the hearing, those provisions of the Rules are made specifically inapplicable to investigations, even though the Commission is required to initiate civil or criminal proceedings if an investigation discloses violations of law. Undoubtedly, the reason for this distinction is to prevent the sterlization of investigations by burdening them with trial-like procedures. (Footnotes and citations omitted).

The issue before this Court is not every aspect of SEC investigations, but rather a single feature, i.e., whether notice must be given to "targets" of non-public investigation when subpoenas are issued to third parties. Applying the rationale of *Hannah* by analogy, one is logically drawn to the conclusion that if a "target" of an investigation does not have to be apprised of the names of complaintants under the Due Process Clause of the Fifth Amendment, *a fortiori* a "target" of a subpoena need not be supplied under that Clause with the names of third parties, who are not even necessarily complaintants, on whom the subpoenas have been served.

Although the court below did not utilize the Due Process Clause of the Fifth Amendment in reaching its decision, a second case, relying on the judgment below as precedent, held that there is a "due process right to notice of third party subpoenas." *Wedbush, Noble, Cooke, Inc.* v. *SEC*, No. CV-83-3961 CBM (KX) (C.D.Cal. July 11 1983). The Court of Appeals for the Ninth Circuit declined to issue an emergency stay of the *Wedbush* court's "injunction against continuation of the investigation without notification to ["targets"] of the third-parties subpoenaed by the SEC." The Court of Appeals found that "*O'Brien* . . . is . . . final for such purposes as stare decisis, and full faith and credit, unless it is withdrawn by the court." *Wedbush, Noble, Cooke, Inc.* v. *SEC*, 714 F.2d 923, 924 (9th Cir. 1983). The Court of Appeals for the Ninth Circuit has declined to hear *O'Brien* en banc (*Jerry T. O'Brien, Inc.* v. *SEC*, 719 F.2d 300 (9th Cir. 1983)). The lower court's decision, therefore, remains as precedent to be used in decisions even more far-reaching than *Wedbush*. The effect of *O'Brien*, and its pro-

geny *Wedbush*, are squarely in conflict with the analysis of *Hannah*. Not only should the lower court's judgment be reversed, but the additional due process rationale of *Wedbush* should be discredited. In addition to using the rationales of *O'Brien* and *Wedbush*, subsequent lower courts may attempt to extend the *Wedbush* due process approach into new territory (much as *Wedbush* extended the *O'Brien* rationale), *e.g.*, find a Fourth Amendment requirement to notify "targets" of third-party subpoenas. The *O'Brien* pandora's box should be immediately closed by this Court to avoid further extensions of the lower court's "target"-notice requirement.

POINT III

Federal agencies, and in particular the SEC, are not required by the Fourth Amendment, U.S. Constitution, to notify "targets" of non-public investigations when subpoenas are issued to third parties.

This Court has made an analogy between the "investigative functions performed by the administrative subpoena and the demand for entry" (*See* v. *City of Seattle*, 387 U.S. 541, 545 (1967)) by characterizing a subpoena as a "figurative" or "constructive" search (*Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 202 (1946)). With regard to the functions served by a subpoena and by a warrant, the analogy can be continued. Justice Stevens in his dissent, *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 332 (1978), inquired: "What purposes, then, are served by the administrative warrant procedure? The inspection warrant purports to serve three functions: to inform [a person] that the inspection is authorized by the statute, to advise him of the lawful limits of the inspection, and to assure him

that the person demanding entry is an authorized inspector *Camara* v. *Municipal Court*, 387 U.S. 523, 532, 87 S.Ct. 1727, 1732, 18 L.Ed.2d 930 [1967]." What purposes, then, are served by an administrative subpoena? The subpoena serves three similar functions: to inform the *person being subpoenaed* that the request is authorized by statute, to advise *him* of the lawful limits of this "figurative or constructive" search, and to assure *him* that the person demanding information is an authorized person. By analogy to the warrant's purposes, one can strongly argue, therefore, that the requirement of a subpoena is for the benefit of the person in possession of information, not for the protection of persons about whom the information might relate (i.e., possible "targets" of the administrative investigation). If this is the case, on what basis may a "target" interject himself in the subpoena process?

In *Rakas* v. *Illinois*, 439 U.S. 128 (1978), the Court rejected so-called "target" standing by declining to hold that a defendant in a criminal case may "assert that a violation of the Fourth Amendment rights of third party [entitle] him to have evidence suppressed at his trial." (*Id.* at 133) The *Rakas* rejection of "target" standing with regard to search warrants appears to be inconsistent with the Court's prior holding in the analogous situation involving administrative subpoenas. In *Donaldson* v. *United States*, 400 U.S. 517, 531 (1971), the Court held to the extent that a person "has a protectable interest, as, for example, by way of privilege, or to the extent he may claim abuse of process, [he] may always assert that interest or that claim in due course at its proper place in any subsequent trial." The issue in this case does not necessarily require a reassess-

ment of *Donaldson* in light of *Rakas*; however, it is anomalous that a "victim" of an actual search has no right to complain of possible Fourth Amendment violations while an "alleged" target of a "constructive" search is provided an opportunity to raise potential abuse of process, a process to which he was not even a party.

The analogy between warrants and subpoenas can be made in another area with regard to a "target" interjecting himself in the subpoena process. Administrative warrants, which involve "actual searches", may be obtained ex parte (See *Marshall* v. *Barlow's, Inc.*, 430 U.S. 307, 316 (1978); *Wyman* v. *James*, 400 U.S. 309, 323 (1971)). Should not "constructive" searches (*i.e.*, administrative subpoenas) be permitted to be carried into effect "ex parte", at least with regard to their possible "targets"? The answer would seem logically to be in the affirmative.

A general requirement under the Fourth Amendment that possible "targets" must be notified of third-party subpoenas would also only exacerbate the concerns raised by the Court in *Zurcher* v. *The Stanford Daily*, 435 U.S. 547 (1978). The *Zurcher* Court, in authorizing the use of a warrant rather than a subpoena to obtain information from a third party, discussed realistic concerns which are also present in the case before this Court (*Id.* at 561):

> The seemingly blameless third party in possession of the fruits or evidence may not be innocent at all; and if he is, he may nevertheless be so related to or so sympathetic with the culpable that he cannot be relied upon to retain and preserve the articles that may implicate his friends, or at least not to notify those who would be damaged by the evidence that the authorities are aware of its location. In any event, it is likely

> that the real culprits will have access to the property, and the delay involved in employing the subpoena *duces tecum*, offering as it does the opportunity to litigate its validity, could easily result in the disappearance of the evidence, whatever the good faith of the third party.

As demonstrated, arguments of a constitutional nature, based on the analogy to warrants, can be made against imposition of a Fourth Amendment requirement that "targets" be notified of third-party subpoenas. Beyond that, however, practical considerations such as those raised in *Zurcher* also suggest that this type of requirement would be unwise by increasing the threat to the integrity of the administration investigatory function. In addition to raising succinctly the inherent threat to the integrity of an investigation occasioned by use of third-party subpoenas, the *Zurcher* Court strongly implied that "targets" are not generally aware of issuance of subpoenas: "The seemingly blameless third party in possession of . . . evidence . . . cannot be relied upon . . . not to notify those who would be damaged by the evidence [*i.e.*, the 'targets'] that the authorities are aware of its location." (*Zurcher* at 561.)

Because of the precedents of this Court interpreting the Fourth Amendment as it relates to warrants, one can reason by analogy that no "target"-notice requirement is imposed by the Fourth Amendment with regard to subpoenas. This conclusion is reinforced by the practical considerations raised in *Zurcher* v. *The Stanford Daily*.

POINT IV

Federal agencies, and in particular the SEC, are not required by *United States* v. *Powell*, 329 U.S. 48 (1964), to notify "targets" of non-public investigations when subpoenas are issued to third parties.

The underlying premise of the holding of the court below is that "targets of the investigation [do] have a right to be investigated consistently with the *Powell* standards. *Cf. Powell*, 379 U.S. at 57-58." (*Jerry T. O'Brien, Inc.* v. *SEC*, 704 F.2d 1065, 1068 (9th Cir. 1983)). When one checks *Powell* at the pages indicated, no such requirement is revealed. The *Powell* Court on these pages discusses the circumstances under which an agency is entitled to avail itself of *judicial enforcement* of the agency's subpoenas (*Powell* v. *United States*, 379 U.S. 48, 58 (1964)):

> It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. (Footnote omitted.)

Before an agency applies to a court for enforcement of a subpoena, however, the integrity of the court's process is not directly involved. The agency, rather, is carrying out its investigatory function as defined by the Congress and implemented by agency rules, subject to Constitutional limitations.

If every agency request for information were required to satisfy the four-part *Powell* test (*Powell* at 57-58), the agency investigatory function might be hindered. Prior to

enforcement by a court, an administrative summons is, in fact, only a request for information, albeit a request with potential for coercion (See *Cudahy Packing Co.* v. *Holland*, 315 U.S. 357, 363 (1942)). The fact remains, however, that in most circumstances an administrative summons may be ignored.

Why should the scope of agency inquiries for information be limited to that defined by considerations relevant to whether a court will permit its process to be used? Obviously an agency might abuse its investigatory function, but that is not the issue before the Court. Allegations of that nature can be brought another day in another forum. The issue presented by the court below is: Do targets of investigations have a right to be investigated consistently with the *Powell* standards? (*O'Brien* at 1068). The appropriate answer would seem to be that as long as an agency stays within the authority granted by the Congress (and as defined by its own regulations) and does not act unconstitutionally, investigations (to include requests for information either from "targets" or from third parties) may be conducted without regard to the *Powell* standards. If, however, an agency desires to invoke a federal court's process to obtain information, the request must comport with the criteria established by this Court, i.e., the *Powell* standards.

The rationale of the lower court that *Powell* v. *United States* prescribes standards with which agencies must comply in conducting investigations is without basis. *Powell* relates to enforcement of a subpoena, not to how agencies in general are to perform their investigatory function. That

is a matter for the Congress and the agency to decide, subject to constitutional limitations.

The structure of Section 6 of the APA (5 U.S.C. § 555) adds support to the conclusion that the law governing administrative investigations is different from the law relating to judicial enforcement of agency subpoenas. Section 6(b) contains the basic statement relating to an agency's investigatory powers: "Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law." (5 U.S.C. § 555(c)). The provision relating to judicial enforcement is contained in Section 6(c) (5 U.S.C. § 555(d)). Clearly the drafters of the APA were separating the two subjects: issuance of investigatory subpoenas and judicial enforcement of those subpoenas.

This interpretation is supported by the Attorney General's Manual on the Administrative Procedure Act, 68-69 (1947):

> The second sentence of section 6(c) [5 U.S.C. § 555(d)] provides that "Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law . . . ." Upon its face, the subsection in requiring judicial enforcement of subpoenas "found to be in accordance with law" is a reference to and an adoption of the existing law with respect to subpoenas. For example, nothing in section 6(c) seems intended to change *existing law as to the reasonableness and scope of subpoenas*. Similarly, the subsection leaves unchanged *existing law as to the scope of judicial inquiry where enforcement of a subpoena is sought* . . . . Nothing in the language of section 6(c) suggests any purpose to change this established rule. It is said only that the court shall enforce a subpena "to the extent that it is found to be in ac-

> cordance with law." "Law" refers to the statutes which a particular agency administers, together with relevant judicial decisions. (Emphasis added)

Two separate issues are addressed: (1) the "existing law as to the reasonableness and scope of subpoenas" and (2) the "existing law as to the scope of judicial inquiry where enforcement of a subpoena is sought." The former, one can argue, is governed by the "statutes which a particular agency administers, together with relevant judicial decisions" which (one can reasonably infer) interpret those statutes. The latter, on the other hand, is a matter of judicial administration and is governed by *Powell*. The *Powell* standards, therefore, should be viewed as applicable only to the "scope of judicial inquiry where enforcement is sought," not to defining the "existing law as to the reasonableness and scope of subpoenas."

If *Powell* v. *United States* does not require administrative investigations be conducted according to the *Powell* standards, the basis for the lower court's decision evaporates. Because of the language used by the *Powell* Court, which is consistent with the structure and legislative history of the APA, it is argued the *Powell* standards do not require that "targets" of non-public investigations receive notice of issuance of subpoenas to third parties, but rather apply only to judicial enforcement of administrative subpoenas. To paraphrase a recent decision of this Court sustaining an administrative subpoena against a Fourth Amendment challenge: The court below undertook to apply a holding of this Court which does not exist. See *Donovan* v. *Lone Steer, Inc.*, 52 U.S.L.W. 4087, 4089 (Jan. 17, 1984) ("We think that the District Court undertook to decide a case not before it").

CONCLUSION

An examination of the Court's opinion in *Hannah* v. *Larche*, 363 U.S. 420 (1960), discloses an analysis model for evaluating allegations of improper agency investigatory procedures: First, determine whether the "Congress did authorize the Commission to adopt the procedures in question." (*Id.* at 431). Second, "determine whether the Commission's Rules of Procedure are consistent with the Due Process Clause of the Fifth Amendment."(*Id.* at 440).

The first consideration was addressed in Point I, which reviewed general statutory law applicale to agency investigation by subpoena (*i.e.*, the APA) and the specific provisions relating to the SEC. No Congressional intent was identified which requires, as a general principle, an agency (or, in this instance, a requirement for the SEC) to notify "targets" of the identity of persons who are subpoenaed. The second consideration was addressed in Point II. Authority was presented to demonstrate that agency regulations which do not require the identities of third parties be released to "targets" of investigations are not violative of the Due Process Clause of the Fifth Amendment. In addition, discussion in Point III illustrated that such regulations do not violate the Fourth Amendment. A third level of analysis was also used in *Hannah*, although not expressly identified: Do the agency's procedures brought into issue violate decisions of this Court? Although it is the function of this Court to interpret authoritatively its own decisions, Point IV strongly suggests that the investigatory procedures used by the SEC in this case are not precluded by the decisions of this Court, especially *Powell* v. *United States*.

Once this three-fold analysis is completed and, as here, an agency's investigatory procedure is found to be statutorily authorized, promulgated within that authorization, constitutionally firm, and not precluded by the decisions of this Court, what then is the basis for a decision like that of the court below? The five judges who dissented from the denial by the Court of Appeals of a rehearing en banc stated succintly what seems to be an obvious conclusion (*Jerry T. O'Brien, Inc.* v. *SEC*, 719 F.2d 300, 300 (9th Cir. 1983)):

> The rule set forth by the panel opinion goes beyond any reasonable interpretation of the Supreme Court's opinions; is an unwarranted extension of, if not in open conflict with, our own opinions; and is an improper intrusion on the administrative function.
>
> There is no principled basis for confining the panel holding to the context of an SEC investigation. It threatens to compromise government investigations by most agencies. Not only will wrongdoers be provided a new instrument of obstruction or delay, but also employees and others subject to reprisals will be chilled from cooperating with investigators. (Citations omitted.)

Less than six years ago, albeit in a different context, this Court in a unanimous decision forcefully stated to courts below:

> [T]his much is absolutely clear. Absent constitutional constraints of extremely compelling circumstances, the "administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' "

Vermont Yankee Nuclear Power v. *Natural Resources Nuclear Power Corporation*, 415 U.S. 519, 543 (1978), quoting *FCC* v. *Schreiber*, 381 U.S. 279, 290 (1965), quoting *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). *Vermont Yankee* confirmed in forceful language that with regard to informal rule making (that conducted under 5 U.S.C. § 553), "courts are not generally free to impose [additional procedural rights] if the agencies have not chosen to grant them. This is not to say necessarily that there are no circumstances which would ever justify a court in overturning agency action because of a failure to employ procedures beyond those required by the statute. But such circumstances, if they exist, are extremely rare." (*Vermont Yankee* at 524).

In the case before this Court, neither the Constitution, the Congress, nor decisions of the Court, require procedures beyond those employed by the SEC. The lower court's decision is, therefore, another unwarranted intrusion into the administrative process. A court's "perceived inadequacies of the procedure employed" (*Id.* at 541), whether in the area of informal rule making or as here with regard to agency issuance of investigatory subpoenas to third parties, provide no basis for finding that agency procedures — authorized by statute, constitutionally firm, and not precluded by decisions of this Court — are legally insufficient. The philosophy of *Vermont Yankee* — that "judicial intervention [will not be permitted to] run riot" in the administrative process — should be reasserted and reaffirmed. (*Id.* at 557).

No suggestion is made that "targets" of third-party subpoenas are without alternatives. The Congress can be

approached to include in the APA a "target"-notice requirement, as has been recommended by the American Bar Association. On the other hand, persons who believe that they might be potential "targets" can seek agreement, contractually or otherwise, with third-parties not to provide information requested by agency subpoenas, thus forcing an agency to invoke a court's process (and the *Powell* standards) if the information is to be obtained. What is clear is that no "target"-notice requirement currently exists which mandates in the case before the Court that the SEC must give notice to *these* "targets" of *these* third-party subpoenas.

The judgment of the court below should be reversed.

Respectfully submitted,

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